In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-788

ROBERT BROWN, a/k/a BOB BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted of transporting obscene materials in violation of 18 U.S.C. 1462. He raises several of the issues involved in a case in which the Court recently granted the petition for a writ of certiorari, and also asserts that the prosecution failed to rebut his expert testimony or to prove *scienter.*

Following a jury-waived trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of transporting two obscene books from the State of New York to Norfolk, Virginia, by common carrier, in violation of 18 U.S.C. 1462. He was fined $3,000 and placed on probation for three years. The court of appeals affirmed *per curiam* (Pet. App. B 12). On June 25, 1973, this Court granted his petition for a writ of certiorari, vacated the judgment, and remanded to the court of appeals for further considera-

tion in light of *Miller* v. *California*, 413 U.S. 15, and companion cases (Pet. App. F 17). The court of appeals, after further consideration in light of those cases, again affirmed the conviction (Pet. App. G 18).

The essential facts are not in dispute and are set out in the Memorandum for the United States in Opposition to petitioner's previous petition. *Brown* v. *United States*, No. 71-1368.[1] Petitioner was convicted under the *Roth-Memoirs*[2] standard for his transportation of obscene material. At trial he introduced the testimony of a psychiatrist and examples of allegedly comparable materials on the issue of obscenity. The government relied solely on the books themselves.

1. Petitioner raises several questions regarding the effect that this Court's decisions in *Miller* and companion cases have on his case. He contends that 18 U.S.C. 1462 does not satisfy the *Miller* requirement that the statute specifically define the sexual conduct which may not be depicted or described, and that a definition cannot be supplied by judicial construction; that the *Miller* standards may not be applied to his conviction without violating *ex post facto* principles and due process; and that in any event, the new requirement in *Miller* that the materials be judged by local or state community standards necessitates a remand to the trial court for a new trial, rather than to the court of appeals. These are essentially the same issues raised in *Hamling* v. *United States*, No. 73-507, certiorari granted, January 14, 1974. Accordingly, it would appear appropriate to defer disposition on these issues until after *Hamling* is decided.

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[1]We are providing counsel with a copy of the Memorandum.

[2]*Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

2. There is no substance to petitioner's remaining claims. His contention that the government was required to introduce independent evidence with respect to the books' prurient appeal was rejected in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56, and *Kaplan* v. *California*, 413 U.S. 115, 121-122. The Court in *Paris Adult Theatre I* stated: "Nor was it error to fail to require 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence" (413 U.S. at 56).

Petitioner urges, however, that the Court's use of the word "affirmative" indicates that while expert testimony is not necessary in the government's case in chief to establish a *prima facie* case, if the defendant introduces expert testimony denying the obscenity of the materials, then the government cannot sustain a conviction without introducing countervailing evidence. The finder of fact, whether judge or jury, is not required to accept the opinion of expert witnesses as conclusive. See *Hightower* v. *United States*, 325 F.2d 616, 619 (C.A.D.C.), certiorari denied, 384 U.S. 994. The district court here gave ample reason for rejecting the testimony of petitioner's expert witnesses (Pet. App. A 5-7), and its findings should not be disturbed. Moreover, *Kaplan* v. *California, supra*, 413 U.S. at 121, indicates that while the defense may introduce such expert testimony as it wishes, the materials themselves may still be sufficient to establish obscenity.[3]

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[3]The materials here involved are not directed at such a bizarre deviant group as to render the experience of the trier of fact inadequate to judge their prurient appeal. Cf. *Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 56, n. 6. Petitioner's own expert testified that these materials might appeal to homosexuals and pedophiles. As the trial court pointed out (Pet. App. A 4-5),

Petitioner also contends, as he did in his first petition, that the government failed to prove his knowledge of the character of the books. This issue was fully answered in our Memorandum in Opposition to his first petition and by the district court's opinion (Pet. App. A 2-3), upon which we rely here.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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these materials differ from the materials in *United States* v. *Klaw*, 350 F.2d 155 (C.A. 2), and are substantially the same as those involved in *United States* v. *Wild*, 422 F.2d 34 (C.A. 2), certiorari denied, 402 U.S. 986, which were found to be sufficient, in and of themselves, to establish obscenity.